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Opinion following rehearing

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>NOE ROMO GONZALES,<br>Defendant and Appellant. | G054927<br>(Super. Ct. No. 15WF1013)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Arlene A. Sevidal and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Noe Romo Gonzales of one count of first degree burglary of an occupied home (Pen. Code §§ 459, 460, subd. (a)),[1] one count of annoying or molesting a child after trespassing into her home (§ 647.6, subd. (b)), and one count of false imprisonment (§§ 236, 237, subd. (a)). The court sentenced defendant to a total state prison term of 19 years 8 months as follows: (1) the upper term of six years for the first degree burglary count, which was doubled to 12 years pursuant to the three strikes law; (2) one year 4 months (one-third the middle term of two years doubled for the strike) for the annoying or molesting a child count; (3) one year 4 months (one-third the middle term of two years doubled for the strike) on the false imprisonment count; and (4) five years for a prior serious felony conviction.

Defendant raises two issues on appeal, both regarding the count for annoying or molesting a child. First, he contends the court erred by improperly answering a question asked by the jury during its deliberations concerning defendant's knowledge that his victim was less than 18 years of age. Second, he claims the court erred by failing to instruct the jury that he was not guilty of the crime if he reasonably and actually believed the child was at least 18 years of age.

On December 4, 2018, we issued an opinion affirming the judgment. On December 14, 2018, defendant filed a petition for rehearing arguing the case should be remanded for resentencing pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.) (S.B. 1393), which took effect on January 1, 2019 and provides trial courts with discretion to strike five-year serious felony priors, including the one imposed in this case. We agree and remand the matter for resentencing. In all other respects, our decision remains the same.

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[1] All statutory references are to the Penal Code unless otherwise stated.

## FACTS

One evening in May 2015, T.H., a 16 year-old girl, was lying in her bed at home in her yellow pajamas and listening to music on her laptop. Her bedroom lights were off, but a light from a neighbor's house was shining into her bedroom window and dimly illuminated her room. She had decorated her room with posters of Korean pop bands and pictures of her and her friends. A police officer who later arrived at the scene observed T.H's bedroom with the lights on and described it as "a pretty standard 16-year-old girl's bedroom" with "colorful stuff."

As T.H. was laying in bed, someone opened and closed her bedroom door. She assumed it was her father, but she did not see the person who opened the door. T.H. eventually fell asleep but woke up when she heard the door open a second time. She again thought it was her father, but it was a man later identified as defendant. Defendant approach her bed. As T.H. was laying under her blanket, defendant touched her knee and then sat on her bed with their bodies touching at the hips. He then lay down next to T.H. T.H. jumped up and stood on her bed. She asked defendant what he wanted, but he did not respond. She then ran toward the bedroom door, but defendant jumped up and stood in front of her. T.H. walked around defendant's left side and reached the door. The door was locked, but she managed to open it and run to her parent's bedroom.

Defendant followed T.H. out of her room but stopped following her when she reached her parent's bedroom. T.H. woke her father and told him what had happened. Her father ran to the kitchen after he heard the dog barking there and then went to the backyard to look for defendant. While in the backyard, her father noticed the sliding glass door in the living room was open. T.H. called the police who arrived and searched the surrounding area.

While police officers were searching the area, Susan Ramirez, T.H.'s neighbor, opened her kitchen door leading to the backyard and let her two dogs outside. She left the door open so the dogs could get back inside. As she turned around and walked toward the living room, she heard the door close and found defendant in her kitchen. She asked defendant what he wanted, but he did not respond. Ramirez ran away screaming for her husband and went outside where she spoke to a police officer. The police eventually found defendant hiding in someone's backyard and detained him.

Prior to this May 2015 incident, defendant had entered another woman's house in January 2015. The woman was sleeping and woke up in the middle of the night because her dog was growling. When she woke up, she saw defendant standing at the foot of her bed. Defendant eventually ran out of the room, and the woman called the police. The police arrested defendant and found a knife on the woman's kitchen counter.

In connection with the May 2015 incident, the People's operative second amended information alleged two counts of first degree burglary of an occupied home (§§ 459, 460, subd. (a)), one count of annoying or molesting a child after trespassing into her home (§ 647.6, subd. (b)), and one count of false imprisonment (§§ 236, 237, subd. (a)). A jury trial took place in March 2016. For the annoying or molesting a child count, the court provided the CALCRIM No. 1121 instruction to the jury. The written instruction stated: "The defendant is charged in Count 2 with Annoying or Molesting a Child in an Inhabited Dwelling in violation of Penal Code section 647.6(b). [¶] To prove that the defendant is guilty of this crime, or the lesser included offense of Attempted Annoying or Molesting a Child in an Inhabited Dwelling, a violation of Penal Code Section 664/647.6(b): [¶] The People must prove that: [¶] 1. The defendant entered an inhabited dwelling house without consent; [¶] 2. After entering the house, the defendant engaged in conduct directed at a child; [¶] 3. A normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct; [¶] 4. The defendant's conduct was motivated by an unnatural or abnormal sexual interest in

the child; [¶] AND [¶] 5. The child was under the age of 18 years at the time of the conduct. [¶] It is not necessary that the child actually be irritated or disturbed. It is also not necessary that the child actually be touched. [¶] A house is inhabited if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged conduct."

In reciting this instruction to the jury, the court read the second element slightly differently: "After entering the house the defendant engaged in a conduct directed at *the* child." (Italics added.)

During deliberations, the jury asked the court the following question: "Count 2 – element 4. Did the defendant have to know that the victim was a child when he committed the offense to satisfy element 4 of count 2: 'The defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child?'" The court discussed with counsel how to respond to the jury's question. Defendant's attorney suggested "the jury be instructed that the answer to [the question] is yes because in . . . reading . . . the instructions, and also some cases . . . they are talking about how the conduct has to be directed towards a child and motivated by a sexual interest in the child . . . and so, knowing that, especially when you read . . . element no. 2, also together with element no. 4, there has to be some sort of knowledge this is the child." The People suggested the court redirect the jury to the jury instructions.

The court concluded: "The problem is I don't want to add another element, and that's what I'm concerned I would do by saying 'Yes.' It already does state exactly what they are suppose[d] to do. It does state 'directed at a child.' I'm not sure how much more clearer that should be. [¶] So at some level [defendant] would have to know it's a child. But, to answer that, then adds an entire element, in the court's view, of knowledge which is not in one of the elements. [¶] It doesn't state anywhere in here that the defendant had to know it was a child. Now, common sense would lead you to think you would have to know at some point it's a child, because it says 'directed at a child.' [¶] If

I say 'Yes' I'm adding an element. I'm not inclined [to] do that. So at this point I'm just going to refer them back to 1121." Accordingly, the court provided the following written response to the jury: "Please refer back to 1121." The jury did not seek further clarification and reached a verdict later in the day. The jury found defendant guilty on the annoying or molesting a child count, among other counts.

## DISCUSSION

*The Court's Response to the Jury's Question Was Appropriate*

Defendant contends the court erred by referring the jury to the pattern instruction in response to the jury's question. Defendant argues the court instead should have provided a specific response, i.e., instruct that a defendant must know the victim is a child to satisfy the fourth element of CALCRIM No. 1121. The court did not err.

"When a jury asks a question after retiring for deliberation, '[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law.'" (*People v. Eid* (2010) 187 Cal.App.4th 859, 881-882.) "This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] . . . But a court must do more than figuratively throw up its hands and tell the jury it cannot help. . . . It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) We review a claim of error in responding to a jury question for abuse of discretion. (*People v. Hodges* (2013) 213 Cal.App.4th 531, 539.)

The court did not abuse its discretion by instructing the jury to refer back to CALCRIM No. 1121. Defendant was convicted of violating section 647.6, subdivision

(b), which makes a violation of section 647.6, subdivision (a) a wobbler, instead of a misdemeanor, where the offense is committed by entering an inhabited dwelling house without consent. Section 647.6, subdivision (a)(1), in turn, makes it unlawful to annoy or molest any child under 18 years of age. Thus, the plain language of the statute does not suggest knowledge of the victim's age is an element of the crime. Neither do the cases which have interpreted the statute. The element of "annoy or molest" has been judicially defined. "'When [these words] are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this state indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children.'" (*In re Gladys R.* (1970) 1 Cal.3d 855, 867-868.) Thus, a violation of section 647.6, subdivision (b), requires the nonconsensual entry of an inhabited dwelling house, and "(1) conduct a '"normal person would unhesitatingly be irritated by"' [citations], and (2) conduct '"motivated by an unnatural or abnormal sexual interest"' in the victim." (*People v. Lopez* (1998) 19 Cal.4th 282, 289. Thus, the CALCRIM No. 1121 instruction the court gave to the jury fully and accurately instructed on the applicable elements and governing law. Whether and how to respond to the jury's question therefore was vested in the court's sound discretion, and we find no instructional error in the court's decision to refer to the full and complete instructions already given. (*People v. Eid*, *supra*, 187 Cal.App.4th at p. 882; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213 [finding no error where court referred jury to instructions in response to jury's question where the instructions were full and complete]; *People v. Davis* (1995) 10 Cal.4th 463, 522 [same].)

Defendant claims "[a]nswering 'Yes' would have clarified what the jury needed to determine to find [defendant] guilty" and "would not have added an extra element of knowledge to the offense." The second element of section 647.6, subdivision

(b) requires defendant's conduct to be "directed at a child," and the fourth element requires defendant's conduct to be "motivated by an unnatural or abnormal sexual interest in the child." (CALCRIM No. 1121.) While these two elements suggest a defendant likely knows the victim is a child, defendant cites no authority, nor has our research uncovered any, which holds the defendant must know the victim is a child. The court considered this issue and correctly concluded, "It doesn't state anywhere in here that the defendant had to know [the victim] was a child. Now, common sense would lead you to think you would have to know at some point it's a child, because [the second element] says 'directed at a child.' [¶] If I say 'Yes" I'm adding an element. I'm not inclined [to] do that."

Defendant also argues "the court's refusal to respond 'Yes,' suggested to the jury that it was presumed [defendant] knew . . . T.H. was a child." We disagree. The court's "function is to provide the jury with the applicable law [citation], not to intimate what the facts are [citation], nor suggest what instructions deserve 'jury focus.'" (*People v. Neufer* (1994) 30 Cal.App.4th 244, 252.) Here, the court's response to the jury's question was balanced, neutral, and correct, and we will not assume the jury teased out a different meaning or chose to ignore the court's instructions.

Likewise, we disagree with defendant's claim that the court "subliminally suggested to the jury it was a given [defendant] knew [T.H.] was a child" by stating the defendant "engaged in conduct directed at *the* child" when reciting the second element. While the court's oral instruction deviated slightly from CALCRIM No. 1121 by stating "the child" instead of "a child" when reciting the second element, the written jury instruction included the correct language. "The written version of jury instructions governs any conflict with oral instructions. [Citations.] Consequently, as long as the court provides accurate written instructions to the jury to use during deliberations, no prejudicial error occurs from deviations in the oral instructions." (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1113; *People v. Moore* (1996) 44 Cal.App.4th

1323, 1330 fn. 5.) Because the court provided accurate written instructions to the jury, the reported error in the oral instructions was not prejudicial.

Finally, we are not persuaded by defendant's reliance on *People v. Moore*, *supra*, 44 Cal.App.4th 1323. In *Moore*, the jury asked whether there could be simultaneous cohabitation at more than one residence. (*Id*. at p. 1330.) The trial court referred the jury to the definition of cohabitation in the jury instructions but also stated it was "'a question for [the jury] to decide re[garding] whether there can be simultaneous cohabitation.'" (*Ibid.*) The appellate court concluded the trial court did not err in referring the jury to the jury instructions. (*Id.* at p. 1331 ["By advising the jury to reread the cohabitation instruction, which was full and complete for purposes of the facts before it, the trial court fulfilled its duty under section 1138."].) However, the appellate court also concluded the trial court erred by instructing the jury to decide whether there could be simultaneous cohabitation because this left "the jury with the responsibility for deciding a question of law . . . ." (*Id.* at p. 1332.) Here, unlike the trial court in *Moore*, the court did not instruct the jury to decide a question of law. The court only referred the jury to the jury instructions, which fulfilled its duty under section 1138.

*The Court Was Not Required to Instruct the Jury on the Good Faith Mistake of Fact Defense*

Defendant contends the court also erred by failing *sua sponte* to instruct the jury on the good faith mistake of fact defense to a charged violation of section 647.6, subdivision (b). According to defendant, the court should have included the following optional paragraph from CALCRIM No. 1121: "The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the child was at least 18 years of age. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe the child was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime."

A court has a *sua sponte* duty to instruct on a defense only if the defendant appeared to rely on the defense, or if substantial evidence supports the defense and it is not inconsistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) Here, defendant did not rely on a mistaken belief defense. Instead, defense counsel's closing argument attempted to persuade the jury that the evidence was insufficient to prove beyond a reasonable doubt that defendant was motivated by an unnatural or abnormal sexual interest in the child.

"We review defendant's claims of instructional error de novo." (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.) The court did not err by giving CALCRIM No. 1121 without including the good faith mistake of fact defense. Defendant's counsel did not request instruction on the defense, and the court had no *sua sponte* duty to instruct on the defense because there simply was no evidence defendant believed T.H. was at least 18 years old.

In the alternative, defendant argues his trial counsel rendered ineffective assistance of counsel by failing to request inclusion of the good faith mistake of fact defense. As stated by our Supreme Court in *People v. Mendoza Tello* (1997) 15 Cal.4th 264, "We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*Id.* at pp. 266-267.) Here, the record does not disclose why defendant's counsel did not request the good faith mistake of fact defense. Defendant argues "there can be no reasonable explanation for counsel's failure to request full and accurate instruction on behalf of his client particularly in light of the jury's question and the court's refusal to grant the defense request to answer 'Yes.'" We disagree. Defendant's counsel may have reasonably concluded, as do we, that there simply was no evidence that

defendant believed the victim was at least 18 years old. Because we have no record of counsel's reasons for not requesting the defense, and without any evidence in the record by which to assert the defense, we reject the ineffective assistance of counsel claim.

Finally, we need not address whether there was prejudice arising from any instructional error because we conclude the court did not err in its response to the jury's question or its omission of the good faith mistake of fact defense.

*The Matter Is Remanded for Resentencing*

Defendant's sentence in this case includes a five-year prior serious felony enhancement pursuant to section 667, subdivision (a)(1). At the time of defendant's sentencing, the court had no power to strike or dismiss the five-year serious felony prior. Defendant filed a petition for rehearing, which we granted, and argued he is entitled to the benefit of S.B. 1393. While this appeal was pending, the Governor signed S.B. 1393, which took effect on January 1, 2019. S.B. 1393 amends sections 667, subdivision (a) and section 1385, subdivision (b) so the court may now, in its discretion, strike or dismiss a prior serious felony conviction for sentencing purposes. The People concede the rule of retroactivity in *In re Estrada* (1965) 63 Cal.2d 740 applies to S.B. 1393. However, the People argue remand is futile because the court "clearly indicated that it would not strike the serious felony prior enhancement . . . ." According to the People, the court denied defendant's motion to dismiss his strike prior under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 and imposed the maximum term of imprisonment. Among other things, the People point to the court's statements that it was "not going to give less" and that the facts were "extremely disturbing, extremely dangerous." The court also referenced a sex offender risk assessment, which designated defendant as "moderate high risk," and noted T.H.'s age and the nature of the crime. Despite these comments, we cannot conclude categorically that the court would not exercise its discretion to strike the

prior serious felony enhancement. We are not suggesting how the court should exercise its discretion, but rather giving it the opportunity to do so in the first instance.

## DISPOSITION

The matter is remanded to the court with directions to exercise its discretion under S.B. 1393 whether to strike the prior serious felony enhancement pursuant to sections 667, subdivision (a) and 1385, subdivision (b). In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.